TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 71.

JOHN J. MOORE, TRADING UNDER THE FIRM NAME OF J. J. MOORE & COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE [illegible], 1903.

(18,991.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1903.

1 In the Court of Claims.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Company,
vs.
THE UNITED STATES.
No. 21450.

I.—*Petition. Filed August* 10, 1899.

To the chief justice and judges of the Court of Claims:

The claimant, John J. Moore, trading under the firm name of J. J. Moore & Company, respectfully represents and shows:

1. That he is a citizen of the United States, residing in the city of San Francisco, in the State of California, has always yielded true allegiance to the United States, and is the owner of the claim hereinafter sued upon, it never having been sold or assigned to any person or persons whomsoever.

2. That on the 21st day of June, A. D. 1898, the claimant, a general commission merchant and shipper at San Francisco, California, entered into a contract in writing with the United States, through Lieutenant Colonel J. W. Pope, chief quartermaster U. S. V. United States Army, which contract is made a part hereof by this
2 reference thereto and will be introduced in evidence on the trial of the case; that the contract was approved by W. Merritt, major general U. S. A. commanding, on the 6th day of July, 1898; that by the terms and conditions of the contract, the claimant agreed to furnish and deliver to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered at the wharf at the rate of not less than 100 tons per day, about 3,900 tons of the best merchantable "Wallsend" Australian steam coal, at 2,240 pounds to the ton, dangers of the sea and any causes beyond claimant's control excepted, the deliveries to commence on the arrival of the Hawaiian ship "Euterpe" at Honolulu on or about July 23rd, 1898, for and in consideration of which the claimant was to be paid at the office of the quartermaster, United States Army, at San Francisco, California, at the rate of $9 per ton, of 2,240 pounds, in gold coin of the United States.

3. That at the time of entering into such contract, it was, and ever since has been, the usage and custom of ship owners, shippers, commission merchants, freighters, and charterers at the port of San Francisco, California, when executing charter-parties, to make them contain a stipulation either in the following language, or in language substantially like it, to wit:

"To be discharged as customary, in such customary berth or place as consignees shall direct, ship being always afloat, and at the average rate of not less than one hundred tons per weather working day (Sundays and holidays excepted), to commence when the ship

is ready to discharge, and notice thereof has been given by
3 the *captain* in writing; if detained over and above the said laying days, demurrage to be at 4*d.* register ton per day."

That at the time of the execution of the contract hereinbefore mentioned, and ever since that time, the officers of the United States Army, at San Francisco, California, representing the United States in contract and business relations, had notice and knowledge of the usage and custom aforesaid.

That at the time of chartering the "Euterpe," the claimant, pursuant to such usage and custom, and at the instance and request of the owners of the ship, entered into a written agreement, or charter-party, with such owners, which contained the stipulation above quoted, and that the demurrage therein stipulated for was usual, reasonable and proper.

4. That the claimant entered upon the discharge of the contract, and caused the Hawaiian ship "Euterpe," which claimant had chartered, to be loaded with 1,543 tons of the best merchantable "Wallsend" Australian steam coal, to arrive at Honolulu, Hawaiian islands, July 31st, 1898; that her cargo of coal was not finally discharged to, or taken possession of by, the United States until August 29th, 1898, making 30 days inclusive in which the vessel and cargo lay at that port; that, allowing 24 hours after the arrival of the ship and cargo and the giving of notice by the captain to the United States of her readiness to discharge, the ship was 27 days in discharging her cargo of 1,543 tons of coal, whereas had she been discharged according to the terms of the contract, at the rate of
4 not less than one hundred tons per day, the cargo should have been discharged to and received by the United States in sixteen days; and that during all that time, the "Euterpe" and the consignors of the coal were ready to discharge it according to the terms of the contract, but the United States failed to comply therewith, as hereinbefore stated, thus causing the loss of 11 days of time, after duly allowing for Sundays, and to the damage of the claimant in the sum of $1,053.36 which is at the rate of 4*d.* coin of Great Britain, per register ton per day, the register tonnage of the "Euterpe" being 1,197 tons, that being the amount of the damage or demurrage and reasonably lawfully charged against the claimant by the owners of the ship for such 11 days' loss of time, and which claimant paid to the owners of the ship lawfully and rightfully.

5. The claimant avers that the delays and defaults of the United States, as in this paragraph of the petition set forth, were to his damage in the sum of $1,053.36 which is due to him and unpaid, and that no action on the claim has been taken by the United States except a failure to pay that amount upon the demand of the claimant.

Wherefore the claimant prays judgment on this paragraph of the petition for one thousand and fifty-three dollars and thirty-six cents.

Second paragraph.

The claimant, John J. Moore, trading under the firm name of J. J. Moore & Company, further respectfully represents and shows:

1. That he is a citizen of the United States, residing in the
5 city of San Francisco, in the State of California, has always yielded true allegiance to the United States, and is the owner of the claim hereinafter sued upon, it never having been sold or assigned to any person or persons whomsoever.

2. That on the 23d day of June, A. D. 1898, the claimant, a general commission merchant and shipper at San Francisco, California, entered into a contract in writing with the United States, through Lieut. Colonel J. W. Pope, chief quartermaster U. S. V. United States Army, which contract is made a part hereof by this reference thereto, and will be introduced in evidence on the trial of the case; that the contract was approved by W. Merritt, maj. general U. S. A. commanding, on the 6th day of July, 1898; that by the terms and conditions of the contract, the claimant agreed to furnish and deliver to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered on the wharf as customary, at the rate of not less than 100 tons per day, about 5,000 tons of the best merchantable "Australian," "Seaham," "Wallsend" or "Pacific Co-operative" steam coals, at 2,240 pounds to the ton, dangers of the sea and any causes beyond claimant's control excepted, the deliveries to commence at Honolulu on or about October 1st, 1898, for and in consideration of which the claimant was to be paid at the office of the quartermaster, United States Army, at San Francisco, California, at the rate of $9 per ton, of 2,240 pounds, in gold coin of the United States.

3. That at the time of entering into contract, it was, and ever since has been, the usage and custom of ship owners, shippers,
6 commission merchants, freighters and charterers at the port of San Francisco, California, when executing charter-parties, to make them contain a stipulation either in the following language, or in language substantially like it, to wit:

"To be discharged as customary, in such customary berth or place as consignees shall direct, ship being always afloat, and at the average rate of not less than one hundred tons per weather working day (Sundays and holidays excepted) to commence when the ship is ready to discharge, and notice thereof has been given by the *captain* in writing; if detained over and above the said laying days, demurrage to be at 4*d.* per register ton per day."

That at the time of the execution of the contract hereinbefore mentioned, and ever since that time, the officers of the United States Army at San Francisco, California, representing the United States in contract and business relations, had notice and knowledge of the usage and custom aforesaid. That at the time of chartering the ships hereinafter named, the claimant, pursuant to such usage and custom, and at the instance and request of the owners of the ship, entered into a written agreement, or charter-party, with such owners,

which contained the stipulation above quoted, and it is averred that the demurrage therein stipulated for was usual, reasonable and proper.

4. That the claimant entered upon the discharge of the contract aforesaid, and caused the American bark "Harvester," which he had chartered, loaded with 2,179 tons of the best merchantable "Australian," "Seaham," "Wallsend" or "Pacific Co-operative" steam
7 coals, to arrive at Honolulu, Hawaiian islands, August 28, 1898; that her cargo of coal was not delivered to, or taken into possession by, the United States until October 7th, 1898, making 41 days inclusive in which the vessel and cargo lay at that port; that, allowing 24 hours after the arrival there of the ship and cargo, and the giving of notice by the captain to the United States of her readiness to discharge the cargo, the ship was 35 days after allowing for Sundays and holidays in discharging her cargo of 2,179 tons, whereas had she been discharged according to the terms of the contract, at the rate of not less than 100 tons per day, after making all proper allowances, the cargo should have been discharged to and received by the United States in 22 days; that during all of that time, the ship and the consignors of the coal were ready to discharge it according to the terms of the contract, but the United States failed to comply therewith as hereinbefore stated, thus causing the loss of 13 days' time, to the damage of the claimant in the sum of $1,433.12 which is at the rate of 4*d.* coin of Great Britain per register ton per day, the register tonnage of the "Harvester" being 1,378 tons, that being the amount of the damage or demurrage reasonably and lawfully charged against the claimant by the owners of the ship for such 13 days' loss of time, and which he must pay to the owners lawfully and rightfully.

5. That in further compliance of the contract aforesaid, the claimant caused the British ship "General Gordon," which he had chartered laden with 2,455 tons of the best merchantable "Wallsend," "Australian," "Seaham" or "Pacific Co-operative" steam
8 coals, to arrive at the port of Honolulu, Hawaiian islands, August 27th, 1898, where she lay until October 4th, inclusive; that the captain gave notice to the United States of her arrival, and on the 9th, 10th, and 11th days of September, 1898, before the "General Gordon" had been given a berth at the wharf, the consul general of the United States took 330 tons from her while lying in the stream, putting the same directly into the United States transport "Arizona"; that it was not until the 14th of September, 1898, that the "General Gordon" was given a berth at the wharf so she could discharge the coal; that she lay at the wharf discharging her cargo for 16 days, and did not leave it until October 4th, 1898, at which time only was the last of her cargo discharged, making 39 days inclusive in which the vessel and cargo lay at that port; that allowing 24 hours after the arrival of the ship and cargo, and the giving of the notice by the captain to the United States of her readiness to discharge it, the ship was 31 days, after duly allowing for Sundays and holidays, in discharging a cargo of 2,455 tons, whereas had she been

discharged according to the terms of the contract, at the rate of not less than 100 tons per day, and after making all due allowances, the cargo should have been discharged to and received by the United States in 25 days' time; that during all of that time the "General Gordon" and the consignors of the coal were ready to discharge it according to the terms of the contract, but the United States failed to comply therewith as hereinbefore stated, thus causing the loss of six days' time, to the damage of the claimant
9 in the sum of $744.48 which is at the rate of 4*d.* coin of Great Britain per register ton per day, the register tonnage of the ship being 1,551 tons; that being the amount of the damage or demurrage reasonably and lawfully charged against the claimant by the owners of the ship for such 6 days' loss of time, and which he paid to the owners lawfully and rightfully.

7. That by the terms of the contract hereinbefore described, the claimant contracted and agreed to deliver to the United States about 5,000 tons of coal in the contract specified, at Honolulu, Hawaiian islands, the deliveries thereof to begin on or about the first day of October, 1898; that in pursuance of such agreement, the claimant, between the dates of September 9th and October 7th, 1898, delivered to the United States such coal at such port to the amount of 4,634 tons, the deliveries being made from the American bark "Harvester" and the British ship "General Gordon;" and that after delivering that amount there remained 366 tons to be delivered to the United States by the claimant in accordance with that contract, and that amount of coals, of the kind and quality described in the contract, he then and there tendered to the United States from the barkentine "Omega," but the United States declined to receive the coal, claiming for some unaccountable reason that the contract was completely filled when the claimant had delivered 4,634 tons; that this refusal of the United States to receive the 366 tons of coal as aforesaid, obliged and compelled the claimant to sell it in the open market in Honolulu to the best and highest bidder, which
10 he did, and at a less price than the United States had contracted to pay him therefor, namely, $3.06¼ per ton, or $1,120.87, and to his loss and damage in that amount.

8. The claimant avers that the delays and defaults of the United States herein set forth, were to his damage in the sum of $3,298.47 which is due to him and unpaid, and that no action on the claim has been taken by the United States, except a failure to pay that amount or any part thereof upon the demand of the claimant.

Wherefor- the claimant prays judgment on this paragraph of petition for three thousand two hundred and ninety-eight dollars and forty-seven cents.

And, on the whole petition, the claimant demands judgment for four thousand three hundred and fifty-one dollars and eighty-seven cents.

JOHN J. MOORE, *Petitioner.*

DUDLEY & MICHENER,
Attorneys for Claimant.

STATE OF CALIFORNIA, }
County of San Francisco, } ss:

John J. Moore, of lawful age, being duly sworn deposes and says that he is the claimant in the above-entitled case, that he has read the foregoing petition, and that the matters and facts therein set forth are true in substance and in fact as he is informed and verily believes.

J. J. MOORE.

Subscribed and sworn to before me, a notary public in and for the said State and county aforesaid, this 3d day of August, A. D. 1899.

GEO. T. KNOX,
Notary Public.

[SEAL.]

11 II.—*Traverse. Filed April* 28, 1903.

In the Court of Claims of the United States, December Term, A. D. 1902.

JOHN J. MOORE & Co. }
vs. } No. 21450.
THE UNITED STATES. }

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

12 III.—*Findings of Fact and Conclusion of Law, and the Opinion of the Court, and the Dissenting Opinion. Filed May* 25, 1903.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Claimant is a loyal citizen of the United States residing at San Francisco, Cal., and is the owner of the claims in question, and has neither assigned nor sold them.

II.

Claimant is a commission merchant and entered into two several contracts with the defendant, duly signed, approved, and delivered, as follows:

"This agreement, entered into this twenty-first day of June, eighteen hundred and ninety-eight, between Lieut. Colonel J. W. Pope, chief quartermaster U. S. vols., United States Army, of the first part, and J. J. Moore, trading under the firm name of and hereinafter designated as J. J. Moore & Co., of San Francisco, in the county of San Francisco, State of California, of the second part, witnesseth, that the said Lieut. Colonel J. W. Pope, chief quartermaster U. S. volunteers, for and in behalf of the United States of America, and the said J. J. Moore & Co., for themselves, do covenant and agree, to and with each other, as follows:

"Article 1. That the said J. J. Moore & Co., themselves, their heirs, executors, and administrators, agree to furnish and deliver, subject to the inspection of a duly appointed agent of the United States, to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered at the wharf at the rate of not less than one hundred (100) tons per day, about thirty-nine hundred (3,900) tons of best merchantable 'Walsend' Australian steam coal, at twenty-two hundred and forty (2,240) pounds to the ton, dangers of the sea and any causes beyond their control excepted.

13 "Article 2. Any alteration in present rate of duty to be for or against the purchaser.

"Article 3. That deliveries on this contract shall commence on the arrival of the British ship *Euterpe* at Honolulu, on or about the twenty-third day of July, eighteen hundred and ninety-eight; that deliveries on this contract shall, if required, commence on the — day of ——, eighteen hundred and —, provided that the agreement is approved by the proper authorities of the War Department; otherwise, not until such approval is obtained.

"Article 4. That it is expressly agreed and understood that this contract shall be noneffective until an appropriation adequate to its fulfillment is granted by Congress and is available.

"Article 5. That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid, at the office of the quartermaster, U. S. Army, who shall be designated by the quartermaster-general, U. S. Army, at San Francisco, California, as follows: For thirty-nine hundred (3,900) tons of Wallsend Australian coal, more or less, at the rate of nine dollars ($9.00) per ton of twenty-two hundred and forty (2,240) pounds, in gold coin of the United States.

"Article 6. That in case of failure of said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to supply deficiency by purchase in open market and to charge up against the party of the second part the extra cost over contract price of any coal so procured.

"Article 7. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said J. J. Moore & Co. are reserved to the United States.

"Article 8. No member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract or to any benefit which may arise herefrom.

"This contract shall be subject to approval of the quartermaster-general U. S. A."

"This agreement, entered into this twenty-third day of June, eighteen hundred and ninety-eight, between Lieut. Colonel J. W. Pope, chief quartermaster, U. S. vols., United States Army, of the first part, and J. J. Moore, doing business under the firm name of and hereinafter designated as J. J. Moore & Co., of San Francisco, in the county of San Francisco, State of California, of the second part, witnesseth, that the said Lieut. Colonel J. W. Pope, chief quartermaster, U. S. volunteers, for and in behalf of the United States of America, and the said J. J. Moore & Co., for themselves, do covenant and agree to and with each other as follows:

"Article 1. That the said J. J. Moore & Co. agree to furnish and deliver, subject to inspection of a duly appointed agent of the United States, to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered on wharf as customary, at a rate of not less than one (100) hundred tons per day, about five thousand (5,000) tons of best-quality Australian Seaham, 14 Wallsend, or Pacific Cooperative steam coals, at twenty-two hundred and forty (2,240) pounds to the ton, dangers of the sea and any causes beyond their control excepted.

"Article 2. Any alteration in present rate of duty to be for or against the purchaser.

"Article 3. That deliveries on this contract shall commence with a cargo of about twenty-two hundred (2,200) tons of coal, to arrive at Honolulu, Hawaiian islands, on or about the first day of October, eighteen hundred and ninety-eight, and to sail from Australia in about twenty-five (25) days after signing of this contract. That deliveries on this contract shall, if required, commence on the -- day of —— eighteen hundred and —, provided that the agreement is approved by the proper authorities of the War Department; otherwise not until such approval is obtained.

"Article 4. That it is expressly agreed and understood that this contract shall be noneffective until an appropriation adequate to its fulfillment is granted by Congress and is available.

"Article 5. That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid at the office of the quartermaster, U. S. Army, who shall be designated by the quartermaster-general, at San Fran-

cisco, California, as follows: For five thousand (5,000) tons of Seaham, Wallsend, or Pacific Cooperative steam coals, as specified, the sum of nine dollars ($9.00) per ton of 2,240 pounds, in gold coin of the United States.

"Article 6. That in case of failure of the said parties of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to supply deficiency by purchase in open market and to charge up against the party of the second part the extra cost over contract price of any coal so procured.

"Article 7. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said J. J. Moore & Co. are reserved to the United States.

"Article 8. No member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract or to any benefit which may arise herefrom.

"This contract shall be subject to approval of the quartermaster general, U. S. A."

Preliminary to the making of said contracts the following correspondence occurred:

"SAN FRANCISCO, CAL., *June 13th*, 1898.

"Major W. A. Wadsworth, United States volunteers.

"DEAR SIR: We beg to offer you, for reply on or before 3 o'clock to-morrow, the 14th inst., a cargo of about 1,600 tons of Wallsend Australian coal delivered at Honolulu, H. I., per British ship *Euterpe* (which sailed from Newcastle, N. S. W., for Honolulu about 10 days ago, and is therefore due to arrive in 30 or 40 days). The price to be ($9.00) nine dollars per ton of 2,240 pounds delivered at Honolulu. Payment to be made at your option in United States gold coin at Honolulu after discharge, or in this city in United States gold coin after receipt of certificate of delivery.

"We also offer you a cargo of about 2,300 tons per Chilean ship *Star of Italy* (now in Australia and due to leave there in about 25 days), delivered at Honolulu at the same price, terms, and conditions as the *Euterpe*. Or this last cargo we will sell delivered at Manila, Philippine islands, at ($12.75) twelve dollars and seventy-five cents per ton, and for this cargo payment can be made either in Manila or San Francisco in United States gold coin at your option in the same manner as described above on the *Euterpe* cargo.

"Trusting to have the pleasure of securing the business,

"We are, dear sir, yours, faithfully,

"J. J. MOORE & CO."

"P. S.—Both the *Euterpe* and *Star of Italy* are very fast sailers and can be depended on to make the voyage to Honolulu in 45 to 50 days or to Manila in 35 to 45 days.

"J. J. M. & CO."

"HEADQUARTERS U. S. EXPEDITIONARY FORCES,
"AND DEPARTMENT OF PACIFIC,
"OFFICE ASSISTANT TO CHIEF QUARTERMASTER,
"*June* —, 1898.

"J. J. Moore & Co., San Francisco.

"GENTLEMEN: Referring to your answer to advertisement for proposals for coal on June 13th, I beg to inform you that I am authorized to accept the cargo of 1,600 tons in ship *Euterpe* and that of 2,300 per *Star of Italy* for delivery in Honolulu.

"Will prepare contracts soon as possible.

"Very truly, yrs.,

"W. A. WADSWORTH,
"*Maj. and Q. M.*"

"SAN FRANCISCO, CAL., *June 21st*, 1898.

"Colonel J. W. Pope, quartermaster-general U. S. volunteers.

"DEAR SIR: We beg to offer you for reply on or before 4 p. m. Friday next, the 24th inst., about 5,000 tons of Australian Wallsend, Seaham, or Pacific first-quality steam coals, to be delivered at Honolulu prior to October 1st, 1898, perils of the sea excepted. The price to be $9.00 (nine dollars) per ton of 2,240 lbs. (exclusive of duty, if any), to be delivered on wharf as customary.

"Payment to be in United States gold coin at San Francisco or Honolulu, at your option.

"We are, dear sir, your obedient servants,

"J. J. MOORE & CO.

"SAN FRANCISCO, CAL., *June 22nd*, 1898.

"Col. J. W. Pope, quartermaster-general U. S. volunteers.

"DEAR SIR: Referring to our offer to you yesterday of 5,000 tons of Australian coals at Honolulu, in connection therewith we
16 now beg to substitute our offer by guaranteeing the first vessel, with the capcity of about 2,200 tons, to sail from Newcastle, N. S. W., within 25 days after signing of contract. We may further add that we expect the vessel to get away within 10 or 15 days, and ask for the extra 10 days only as a precautionary measure to guard against accidents.

"We are, dear sirs, yours, faithfully,

"J. J. MOORE & CO."

"HEADQUARTERS U. S. EXPEDITIONARY FORCES AND
"DEPARTMENT OF PACIFIC,
"OFFICE OF CHIEF QUARTERMASTER,
"SAN FRANCISCO, CAL., *June 22d*, 1898.

"J. J. Moore & Co., 418 California St., San Francisco, Cal.

"DEAR SIR: Replying to your letters of 21st and 22d insts., relative to 5,000-ton delivery of Seaham, Wallsend, or Pacific Co-op. Australian coal at Honolulu at $9.00 ton of 2,240 pounds, with shipment of 2,200 tons within 25 days of signing of contract, I have the honor to state that your offer is accepted, and contract will be drawn immediately.

"Very respectfully,
"J. W. POPE,
"*Lieutenant-Colonel and Chief Quartermaster*
"*U. S. Volunteers, Chief Quartermaster.*"

III.

That at the respective times these contracts were made it was the custom at San Francisco between shippers and shipowners to insert in their charter parties a stipulation to the effect that cargoes were to be discharged as customary, in such customary berth or place as consignee shall direct, ship being always afloat, and at an average specified number of tons per weather working days (Sundays and holidays excepted), to commence when ship is ready to discharge, and notice thereof has been given by the captain in writing, and if detained over and above the said laying days, demurrage to be at 4d. register ton per day, which stipulation was duly inserted in the contract of the claimant with the ships employed by him to transport the coal mentioned in the contracts. It does not appear that the officers and agents of the defendant, who were authorized to make, and did make, the contracts for the defendant, had knowledge or notice of such custom, nor that the contracts or either of them were made in view of such custom.

IV.

The claimant discharged his said contracts as follows: *The first contract:* By the arrival at Honolulu of the ship *Euterpe* with 1,543 tons of coal, July 31, 1898, which was placed in berth at the wharf by the harbormaster of said port August 8, 1898, at 2.15 p. m., and commenced discharging coal at 3 p. m. same day, and finished August 29, 1898, consuming eighteen working days. If she had been discharged at not less than 100 tons per day, the time consumed would have been sixteen days. It does not appear that the
17 defendant was at fault either in the loss of time in arriving at the wharf, nor in the discharge of the cargo afterwards. The court finds the defendant was able, ready, and willing to receive the cargo as rapidly as discharged at the wharf. The claimant paid to the shipowner $1,053.36 demurrage for these delays.

The second contract: 1. By the arrival of the bark *Harvester*, with 2,179 tons of coal, August 28, 1898, at Honolulu, which was placed at a berth at the wharf by the harbormaster September 16, 1898, and began discharging coal on that date, and completed same October 7, 1898, a period of eighteen working days. It does not appear that the defendant was at fault in the loss of time of said last-mentioned ship in arriving at the wharf.

2. By the arrival of the ship *General Gordon* at Honolulu. August 27, 1898, with 2,455 tons of coal. While at anchor, September 9, 10, and 11, 330 tons were discharged into steamship *Arizona*, a transport of defendant, for its own use, after which the *Gordon* was placed at a berth at the wharf by the harbormaster, September 14, at 1 p. m., and then commenced the further discharge of the cargo, completing the same October 4, no delays having occurred at the wharf. It does not appear the defendant was at fault in the ship's delay in reaching the wharf. In the case of each ship the defendants had notice in writing of their respective arrivals within twenty-four hours thereafter. The wharves at Honolulu are under the control of a harbor master. The practice of such harbor master was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned. Claimant paid said shipowners for delays, $1,433.12 to the *Harvester* and $744.48 to the *General Gordon*. All coal delivered was paid for by defendant.

V.

The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this claimant purchased 366 tons of coal of the barkentine *Omega*, then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon claimant sold the same in market, for the best price he could obtain, at $3.06¼ per ton less than $9, the contract price with the defendant, equivalent to $1,120.87, in all and to his loss in that amount.

(J. R.)

VI.

At the time of the delivery of the coal mentioned in the foregoing findings the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the government, a harbor master had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the harbor master. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations, and the order of the harbor master, the same as individuals.

18 Upon the foregoing findings of fact the court decides the claimant is not entitled to recover, and his petition should be dismissed.

WRIGHT, J., delivered the opinion of the court:

Claimant is a commission merchant and entered into two several contracts with the defendant, one June 21, 1898, the other June 23, 1898, by the first of which he sold and undertook to deliver about 3,900 tons of coal to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, to be delivered at the wharf at the rate of not less than 100 tons per day, 2,240 pounds to the ton, the delivery under the first contract to commence on the arrival of the British ship *Euterpe* at Honolulu, on or about July 23, 1898, for which defendant agreed to pay $9 per ton. By the second contract claimant sold and undertook to deliver at Honolulu, on wharf as customary, at a rate not less than 100 tons per day, about 5,000 tons of coal, at 2,240 pounds to the ton, the delivery on the second contract to commence with a cargo of about 2,220 tons, to arrive about October 1, 1898, to sail from Australia about twenty-five days after signing the contract for which defendant agreed to pay $9 per ton. Prior to making the contracts, and as a preliminary step to their execution, claimant had submitted proposals in which the quantity subsequently specified on the first contract was segregated as about 1,600 tons, to be shipped on the *Euterpe*, and 2,300 tons upon another vessel; and in respect of the second contract to be shipped in a vessel with a capacity of about 2,200 tons, to sail from Newcastle within twenty-five days and the residue to be shipped otherwise, and from these propositions the contracts were evolved, introducing into them the language of claimant's propositions, "about 3,900 tons," and "about 5,000 tons," respectively.

At the time the contracts for coal were made it was a custom at San Francisco, where they were entered into, for shipowners to insert in their charter parties a stipulation to the effect that cargoes were to be discharged in such customary berth or place as consignee shall direct, ship always being afloat, at an average specified number of tons per day, to commence when ship was ready to discharge and notice thereof had been given to the consignee. If the ship should be detained beyond the lay days so provided, a stipulated sum was to be paid by the shipper as demurrage. Such stipulations were inserted in the contract of shipping between the claimant and the shipowners he employed to transport the coal in question, but it does not appear that the officers or agents of the defendant who made the contracts had knowledge or notice of such custom, nor that the contracts, or either of them, were made in view or contemplation of such custom.

The harbor at Honolulu was under the control of a harbor master at the time of the arrival of the several ships containing the coal designed for delivery to the defendant in conformity to the contracts in question, and all ships were assigned places at the wharf in the order of their arrival by such harbor master. Although de-

fendant was notified of the arrival of the ships in the harbor, there was delay in reaching a wharf where the cargoes were to be discharged, but such delay was not the fault of the defendant, nor the consequence of negligence on its part, but resulted from the
19 crowded condition of the harbor, the wharves then being occupied by vessels that had previously arrived, and assignments of claimant's ships to a wharf were made by the harbor master as soon as room could be provided for them in conformity to the usage of the port. After the arrival of some of the vessels at the wharf, the cargoes were not discharged as rapidly as the contracts required, but it does not appear defendant was at fault in this particular, but it does appear it had then the ability and was ready and willing to receive and dispose of the cargoes as rapidly as the ships would discharge them at the wharf. For these various delays of the ships, beyond the lay days stipulated in the charter parties, between claimant and the ship owners, the latter preferred claims for demurrage as provided in the shipping contracts, which the claimant paid, and in this suit seeks to recover of the defendant the several amounts of demurrage by him so paid.

The two ship loads of coal under the contract of June 23 fell 366 tons short of 5,000 tons, and a month after the last load was delivered the claimant, to make up this deficiency, purchased the shortage in the harbor and offered to deliver the same to defendant, but the latter refused to accept it, whereupon the claimant sold it in open market for the best price he could obtain, which fell short of the contract price with defendant, and this item of difference is also included in this suit, claimant insisting upon a right of recovery.

In support of his insistence of his right to demand of the defendant payment of demurrage paid by him, claimant contends that defendant was bound by the custom at San Francisco relative to the stipulations contained in the charter parties, and consequently, in that regard, by the charter parties also.

By his contracts with the defendant claimant undertook to deliver the coal at the wharf, and at the wharf as customary, at not less than the stipulated rate per day. By the plain terms of the contracts the claimant had as effectually obligated himself to take the coal to the wharf as he had to cross the sea. There is no ambiguity in the contract in this respect, and it needs no interpretation or construction upon this point, and as the actual terms employed in a written contract afford the most certain and determinate evidence of the intentions of the parties, usage is not admissible to contradict or supersede the positive and definite provisions secured thereby (*Bliven v. N. E. Screw Co.*, 23 Howard, 431), but only to explain whatever is indeterminate in their expression. Besides the presumption is that when the terms of a contract are reduced to writing, and are inconsistent with usage, the parties agree to waive the usage. (Story on Contracts, 649 *et seq.*). It is not admissible, by showing usage, to add to or engraft upon the contract new stipulations, nor to contradict those which are plain. (*Oelricks v. Ford*, 23 Howard, 63; *Insurance Cos. v. Wright*, 1 Wall., 471; *Hearne v. Insurance Co.*, 20 Wall., 492;

National Bank v. Burkhardt, 100 U. S. 692.) At most, it can only be said of the custom at San Francisco to insert certain stipulations in the charter party concerning lay days and demurrage, and the obligation of consignee to supply wharfage, that it was a local custom or usage, and relative to such a usage the Supreme Court said in *Barnard v. Kellogg* (10 Wall., 390):

"The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. 'Usage,' says Lord Lyndhurst, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' And it is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law and make it different in the different communities into which the State is divided leads to mischievous consequences and embarrasses trade and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. * * * 'A contrary doctrine,' says the court in *Thompson v. Ashton* (14 Johnson, 317), 'would be extremely pernicious in its consequences and render vague and uncertain all the rules of law on the sale of chattels.'"

It follows, therefore, from the views we have expressed, that claimant undertook the burden of delivering the coal at the wharf, and at the wharf as customary, and that the only custom the contract related to was such as prevailed at the port of delivery, and there it was necessary to the due performance of the terms of his contract to arrive at the wharf, and the intervening delays, without fault of the defendant, were as the common incidents of the voyages, the losses in consequence of which he possesses no right of action against the defendant. Relative to the failure of some of the ships to discharge cargo as rapidly as the contract required, after reaching the wharf, it does not appear this was the fault of defendant, and for the increase of lay days so occasioned there is no remedy. If fault there was, it was that of the shipmaster.

Neither was defendant bound to accept the 366 tons of coal purchased by claimant in the harbor a month after the delivery of the last ship cargo. The language, "about 5,000 tons," was that of the vendor, he having introduced it into the contract, and should be most strongly construed against him. (Chitty on Contracts, 136 and notes.) What was meant by the contract in this respect was that the

claimant proposed to and did sell two shiploads of coal, the ships having the combined capacity of about the quantity of coal specified. Such, clearly, was the intention of the parties to the contract. (*Brawley v. United States*, 96 U. S., 171.) The two ships arrived and their cargoes were delivered, and so the contract was fully executed before the 366 tons were purchased or offered.

From the views we have expressed it follows the petition should be dismissed, and it is ordered accordingly.

21 NOTT, Ch. J., dissenting:

There were two sets of correspondence eventuating in two contracts between the parties in this case. In the first correspondence the parties negotiated for the sale and purchase of two cargoes of coal on two designated vessels containing in the aggregate about 3,900 tons. In the second correspondence and contract they agreed upon the sale and purchase of "about 5,000 tons." It was also stipulated in the contract that the obligation of the purchaser should be to pay "for five thousand (5,000) tons" without any qualifying words, such as "more or less" or "about." The only reference to a cargo in this contract is that "deliveries on this contract shall commence with a cargo of 2,200 tons."

As regards the refusal of the defendants' officer to receive 366 of these 5,000 tons because the quartermaster department had more coal in Honolulu than was wanted, and the qualifying word of the quantity to be delivered, "about," the case comes under the decision of this and the Supreme Court in *Brawley's case* (11 C. Cls. R., 522; 96 U. S. R., 168). The English decisions have been stricter than the American in the latitude allowed to such qualifying words, but undoubtedly the more just as well as liberal ruling of the Supreme Court is the right one—that they extend only to "accidental variations" from the precise quantity agreed upon in the contract. These qualifying words are generally employed for the protection of the vendor, the difficulty of delivering the precise quantity being on him; and the question generally before a court is whether a vendor did all that could be reasonably required of him within the intent of the parties when they made the contract, or whether he is trying to evade its obligations. Certain it is that no court ever held that *a purchaser* could avoid accepting the precise quantity named in his contract by invoking the words "more or less" and "about."

The contract in this case provides that if the party of the second part—the vendor—should fail to comply with their stipulations, "then the party of the first part shall have the power to supply deficiency by purchase in open market and to charge up against the party of the second part the extra cost over contract price of any coal so procured." If the circumstances had been reversed—if the vendors had failed to procure and tender the "deficiency"—and the quartermaster had gone into the market and purchased coal at rates above the contract price, unquestionably it would be held, as it has been held in a hundred cases, that the claimant was bound to de-

liver 5,000 tons of coal. In the homely language of common sense, "It is a poor rule that won't work both ways."

My conclusion is that the claimants should recover for their loss on the 366 tons of coal tendered and refused.

22 IV.—*Judgment of the Court.*

J. J. MOORE AND COMPANY
v.
THE UNITED STATES. } No. 21450.

At a Court of Claims held in the city of Washington on the 25th day of May A. D. 1903 judgment was ordered to be entered as follows:

The court on due consideration of the premises finds for the defendants and do- order, adjudge and decree that the petition of the claimants be dismissed.

BY THE COURT.

23 V.—*Application for and Allowance of Appeal.*

The claimant hereby makes application for an appeal to the Supreme Court of the United States from the judgment of this court rendered May 25, 1903, dismissing his petition. The claimant assigns as error the conclusion of law which the court reached, and also the judgment of the court dismissing the petition.

The claimant is advised by counsel, and therefore assigns as errors, that the court, on the facts found, should have reached an opposite conclusion of law, and should have rendered judgment for the claimant in the sum of four thousand three hundred and fifty-one dollars and eighty-three cents ($4,351.83).

24 For the reasons above stated, the claimant asks that this, his application for appeal, be allowed, and that a transcript of the case be made and duly certified.

JOHN J. MOORE AND COMPANY,
By DUDLEY AND MICHENER,
His Attorneys of Record.

Filed June 20, 1903.

Order.

Let the appeal be allowed.

CHARLES C. NOTT,
Chief Justice.

June 22, 1903.

25 In the Court of Claims.

JOHN J. MOORE, Trading as John J. Moore and Company,
v.
THE UNITED STATES. } No. 21450.

I, John Randolph assistant clerk of the Court of Claims, certify that the foregoing are true copies of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court,—of the opinion of the court, and the dissenting opinion, of the judgment of the court, dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 26th day of June A. D. 1903.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18991. Court of Claims. Term No. 340. John J. Moore, trading under the firm name of J. J. Moore & Company, appellant, *vs.* The United States. Filed June 29, 1903.